

a

PUBLIC FINANCE BHD.

v.

HOCK SENG HOUSING DVPT. & ORS.

b

HIGH COURT MALAYA, IPOH
 ABDUL MALEK AHMAD J
 [ORIGINATING SUMMONS NO. 24-576-89]
 28 FEBRUARY 1991

c

LAND LAW: Foreclosure proceedings - Two separate charges for 2 sets of lands - Separate accounts - Default - Subsequent consolidation of accounts - Order for sale obtained for one set of - Effect on rights of third party - Redemption of land at pre-consolidation figures - Whether action of plaintiffs equitable - Cause to the contrary - National Land Code .

The defendant, the registered proprietor had on 13 August 1977 executed a charge in favour of the plaintiff of 66 pieces of land (Schedule A) to secure the repayment of a loan up to a limit of RM560,000; on 23 March 1983, it had executed a charge of 215 pieces of land (Schedule B) to secure the repayment of a loan up to a limit of RM3.5 million.

d

On 30 September 1985, the plaintiff had obtained an order of sale 30 September 1985 for the lands in Schedule B. The plaintiff had by letter dated 7 October 1988 informed the defendant that they had exercised their rights to consolidate both the accounts secured by the charges for the lands in Schedules A and B.

e

On 5 July 1989, the plaintiff applied to sell the lands in Schedule A to realise a sum of approximately RM6 million. Despite the application to foreclose the lands in Schedule A only, the amounts outstanding were based on the consolidation of the charge accounts for both the lands under Schedule A and Schedule B.

f

The interveners in this case were the purchasers of the lands in Schedule A, who claimed that they had paid the defendant the full purchase price. On learning of the foreclosure proceedings against the defendant, the interveners had made inquiries and were informed that the redemption sum for their individual pieces of land was approximately RM8,000. However, when they wanted to make payment, they were told that the redemption sum was about RM90,000.

g

The defendant questioned the legality of the plaintiff consolidating the defendant's accounts of the lands under Schedule A and Schedule B after the order for sale had been made for the lands under Schedule B.

The defendant submitted that it was quite willing to repay the redemption sum due for the lands in Schedule A but that the plaintiff had insisted that they pay the balance of RM4 million due on the lands in Schedule B as well. In fact, learned Counsel for the defendant had also agreed to the order for sale being made subject to it being confined to the lands under Schedule A only.

h

The three interveners submitted that they were quite willing to pay the redemption sums due on the lands provided that the calculation was not done on a post-consolidation basis.

Held:*i*

[1] Consolidation of accounts is permitted under the charge annexures in view of para. (xxviii) of the first charge annexure and Clause 21(a) and (b) of the second charge annexure. However, this only ought to be done before any action is taken for the foreclosure of any of the charges to be consolidated.

[2] The plaintiff had exercised their right to consolidate a little too late considering their earlier action to foreclose one of the 2 charges taking into account the fact that the order for sale of lands in Schedule B was 3 years before, and the first auction date was 1 month before the notice to consolidate. Therefore on the purported date of the notice of consolidation there was in fact only one charge remaining to foreclose.

a

[3] The plaintiff were highhanded as it was trying to get more than it ought to receive from the innocent purchasers of the lands in Schedule A - this amounts to cause to the contrary under the National Land Code.

b

[4] The plaintiff are at liberty to apply for an order for sale of the lands in Schedule A only based on pre-consolidation calculations.

[Plaintiff's application dismissed with costs.]

c

Cases referred to:

Associated Credit Corp. Sdn. Bhd. v. Fahlum Dvpt. Sdn. Bhd. & Wong Phuan Foo [1990] 1 CLJ (Rep) 615 (cit)

Bank Bumiputra Malaysia Bhd. v. Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md. Jamin, intervener) [1989] 1 MLJ 381 (cit)

Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384 (cons) Joseph s/o Manikam v. Topwin Dvpt. Sdn. Bhd. & 2 Ors. [1987] CLJ (Rep) 667 (cit)

d

Legislation referred to:

National Land Code 1965, ss. 256(3), 340

For the plaintiff - Ting Moy Hong; M/s. Lim Seong Chun & Co.

For the defendant - Gurbachan Singh; M/s. Bachan & Kartar

For the 1st & 2nd interveners - Chan Kok Keong; M/s. Chan & Associates

For the 3rd interveners - G. Ramanaidu; M/s. R. Naidu & Co.

e

JUDGMENT

Abdul Malek Ahmad J:

It is not disputed that on 13 August 1977 the defendant as registered proprietor had executed a charge in favour of the plaintiff of sixty-six pieces of land all in the Mukim of Kampar, Perak (Schedule A) to secure the repayment of a loan up to a limit of RM560,000 together with interest at the rate of 12% per annum on monthly rests and that on 23 March 1983, the defendant had executed a charge of two hundred and fifteen pieces of land, also all in the Mukim of Kampar, Perak (Schedule B) to secure the repayment of a loan up to a limit of RM3.5 million together with interest at the rate of 16% per annum on monthly rests. What is in dispute is the effect of the plaintiff's letter dated 7 October 1988 stating that they had exercised their rights to consolidate both the accounts secured by the charges for the lands in both Schedule A and Schedule B.

f

g

In their originating summons filed on 5 July 1989, the plaintiff had applied to sell the lands in Schedule A only to realise the sum of RM6,589,256.93 owing as at 7 June 1989 together with interest payable at 17% per annum on monthly rests on the balance of RM6,544,689.97 and at the rate of 12.5% per annum on monthly rests on the rest of the balance, both to be calculated from 1 June 1989 up to the final date of settlement, and for other consequential orders. Despite the application to foreclose for lands under Schedule A only, the amounts outstanding are based on the consolidation of the charge accounts for both the lands under Schedule A and Schedule B.

h

i

a It is also pertinent to point out that in their supporting affidavit, the plaintiff's branch manager had affirmed that they had in fact instituted foreclosure proceedings on the lands in Schedule B *vide* Ipoh High Court Originating Summons No. 312/85.

b In the meantime, the interveners had applied to be added on as interveners by summons in chambers filed respectively on the 29 March 1990, 30 March 1990 and 30 October 1990 which were granted on 30 March 1990, 14 September 1990 and 2 November 1990 respectively as there were no objections from the plaintiff and the defendant. In their supporting affidavits, the first, second and third interveners had stated that they had each bought one of the lands in Schedule A on 17 February 1981, 20 August 1979 and 15 July 1982 respectively and had paid the defendant the full purchase price. Upon knowing of the foreclosure action against the defendant, they had made inquiries and were told that the redemption sum for their individual piece of land was about RM8,000. However, when they wanted to make payment, they were told that the redemption sum was about RM90,000 due to the consolidation of the defendant's accounts. The third intervener had also exhibited the letter from the plaintiff dated 6 August 1980 (Exhibit K3 at encl. 21) which had given the redemption sums as RM11,000 for shophouses, RM9,000 for terrace houses and RM8,000 for semi-detached houses.

d In her submissions, learned Counsel for the plaintiff had told the Court that the lands under Schedule B had in fact been sold by public auction on 26 May 1990 following the order made under Ipoh High Court Originating Summons No. 312/85. As such she was asking only for the order for sale of the lands under Schedule A.

e Learned Counsel for the defendant questioned the legality of the plaintiff consolidating the defendant's account of the lands under Schedule A and Schedule B by letter dated 7 October 1988 after the order for sale had been made for the lands under Schedule B. He was of the view that there was nothing left to consolidate in the circumstances. Learned Counsel added that the defendant was quite willing to repay the redemption sum due for the lands in Schedule A but the plaintiff had insisted that they pay the balance of RM4 million due on the lands in Schedule B as well. In fact, learned Counsel had also agreed to the order for sale being made subject to it being confined to the lands under Schedule A only.

f Both the two learned Counsels for the three interveners submitted that they were quite willing to pay the redemption sums due on their lands provided the calculation was not on a post-consolidation basis.

g I had made reference to the Ipoh High Court Originating Summons No. 312/85 file and had found that the order for sale had been made way back on 30 September 1985. The first auction date was 3 September 1988 which was about a month before the plaintiff's notice to consolidate the defendant's two accounts but there were no bidders. It must also be observed that the said notice was some three years after the order for sale of the lands in Schedule B.

To my mind, consolidation of accounts is permitted under the charge annexures in view of para. (xxviii) of the first charge annexure which reads:

h Section 245 of the National Land Code shall not apply to this chargee. In addition to and without prejudice to any other right of consolidation it is hereby declared that the said land shall not be redeemed save and except on payment of all moneys due under any charge created by us or any person through whom we claim which is at the date vested in the chargee over any property other than the property comprised in this charge.

i

and Clause 21(a) and (b) of the second charge annexure which reads:

- (a) Section 245 of the National Land Code (restricting the right of consolidation) shall not apply to this charge. In addition to and without prejudice to any other right of consolidation it is hereby declared that the said land shall not be redeemed save and except on payment of not only all moneys secured hereby but also moneys secured by any other charge created by the chargor or any person through whom he claims which is at the date hereof or at any time hereafter charged to or vested in the chargee over any property other than the property comprised in this charge.
- (b) Without prejudice to any other remedy which the chargee may have, the chargee may at any time and without notice to the chargor combine or consolidate all or any of the accounts of the chargor with, and liabilities to the chargee and set-off or transfer any sum or sums standing to the credit of any one or more of such accounts in or towards satisfaction of any of the liabilities of the chargor hereunder.

However, my considered view is that it ought to be before any action is taken for the foreclosure of any of the charges to be consolidated. The plaintiff here had exercised their right to consolidate a little too late considering their earlier action to foreclose one of the two charges taking into account the fact that the order for sale was three years before, and the first auction date was one month before, the notice to consolidate. As such, on the purported date of the notice of consolidation, there was in fact only one charge remaining to foreclose. What was there to consolidate? Moreover, they had calculated the redemption sums before the consolidation and had informed the purchasers and it would not be just and equitable to ask for ten times the agreed amount by a delayed notice to consolidate. The defendant and the interveners here are all willing to pay redemption sums due before consolidation and I could have ordered the sale for the lands in Schedule A only based on pre-consolidation accounts but the highhandedness of the plaintiff in the matter in trying to get more than what they ought to receive from the innocent purchasers of the lands in Schedule A can only amount to cause to the contrary under the National Land Code 1965 (hereinafter "the Code") to entitle me to dismiss their application altogether with costs.

In an application for sale of land charged, the Federal Court in *Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384, had ruled that the Court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether a cause to the contrary has been shown or not in accordance with s. 256(3) of the Code. It further held that the chargee must not only come to Court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order. This finding stands despite acknowledging the fact that the chargee has priority over the purchasers Vol by virtue of s. 340 of the Code as has been decided in *Bank Bumiputra Malaysia Bhd. v. Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md. Jamin, intervener)* [1989] 1 MLJ 381, *Joseph s/o Manikam v. Topwin Dvpt. Sdn. Bhd. & 2 Ors.* [1987] CLJ (Rep) 667 and *Associated Credit Corp. Sdn. Bhd. v. Fahlum Dvpt. Sdn. Bhd. & Wong Phuan Foo* [1990] 1 CLJ (Rep) 615.

Consequently, the third intervener's application filed on 20 December 1990 for their land to be excluded from the order for sale applied for becomes quite unnecessary and I made no order. The plaintiff is of course at liberty to apply for an order for sale of the lands in Schedule A only based on pre-consolidation calculations.

Also found at [1991] 3 CLJ 2210